of new stations,[40] the devastating effect of repeal on independent stations would severely undermine those new networks, diminishing competition and diversity at the national level as well as the local level. Thus, repeal of PTAR would have far-reaching public interest consequences that strike at the heart of the most fundamental Commission policies.

B. **Repeal Will Result in the Displacement of First-Run Programming.**

As discussed above, LECG's econometric model projects the impact of repeal on independent station ratings during crucial time periods. Other portions of the economic study help explain why repeal of the rule would have such a devastating effect. The basic reason is that PTAR has played a pivotal role in ensuring that independent stations have access to recent off-network hits for airing during the access hour, and repeal of PTAR would cut off such access and require those stations to substitute lower-rated off-network shows.

The LECG Report demonstrates that first-tier off-network programs have certain cost and risk attributes that cause them to be preferred by television stations, whether those stations are network affiliates or independent stations, over most first-run programs -- even some more highly rated first-run programs. Syndicators of off-network product can syndicate their programs for less than first-run programs because both the per episode costs and upfront costs that must be incurred to launch a first-

[40] See pages 9-13 supra.

run program are much larger than those that must be incurred to syndicate an off-network program.[41] Whereas the cost of producing an off-network program is a sunk cost, a substantial portion of which has already been recovered from the network license fee by the time it reaches syndication after four or five years on the network,[42] the entire cost of producing a first-run program must be covered by syndication fees.

In addition, the costs of promoting a first-run program are much greater than the costs of promoting an off-network program because the former starts out an unknown quantity and the cost of establishing its name recognition is high. In contrast, only the most successful, long-running network shows go into syndication, so an off-network series goes into syndication with instant audience recognition. Indeed, the national name recognition and visibility acquired by a network prime time run of several years cannot be matched by even the most generous first-run promotional budget.[43]

Furthermore, because first-run programs are an unknown quantity with no ratings history or prior audience exposure, they are far riskier than off-network programs to syndicate, as well as being more expensive to promote. Of the first-run programs offered for sale -- i.e., developed, produced and promoted

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[41] See LECG Report at 63-81.

[42] The LECG Report indicates that network license fees cover about 80% of the cost of producing a network program. See LECG Report at 64.

[43] See LECG Report at 72.

through the conceptual and pilot stages -- fewer than half are picked up by enough stations to warrant committing the substantial budget required to produce the program for the first year. And of those programs that are actually syndicated, more than two-thirds fail during their first year, resulting in a total loss of substantial production and promotional costs.[44] In short, first-run syndication is an extremely risky business with a high failure rate for new product.[45]

Given these facts, there is little doubt that if PTAR's off-network restriction were repealed, network affiliates would have substantial economic incentives to replace some of the first-run fare that they currently run during the access hour with off-network programs -- even if the off-network programs were to produce somewhat lower ratings.[46] New first-run programs offered in syndication would have an even more difficult time competing with off-network fare; in addition to suffering the cost-disadvantages discussed above, they are a far riskier proposition to the station than off-network programs.

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[44] The LECG Report indicates that only 39% of the first-run shows offered for sale each year from the 1988-89 season through the 1993-94 season were picked up by enough stations to warrant syndication, and only 29% of those that were syndicated were successful enough to be produced for a second season. See id. Thus, the average survival rate of first-run programs during these years was 11% (the product of 39% x 29%). Id.

[45] As LECG observes in its economic report, first-run syndication fees must cover not only the production and promotional costs of the program being syndicated, but also those associated with failed first-run programs of the syndicator.

[46] See LECG Report at 63-81.

Nor is there any doubt that affiliates could almost always outbid independent stations in their markets for any off-network programs they desire to purchase. As discussed above, network affiliates are, on average, far more profitable than their independent competitors, and can attract substantially larger audiences for the same program than independent stations.[47] The ability to attract a larger audience for the same program unquestionably translates into the ability to collect larger advertising revenues and to pay more for the program.

Thus, repeal of the off-network restrictions would surely lead to the displacement of first-run programs by popular off-network programs on the prime time schedules of a substantial number of network affiliates and the loss of the most popular off-network programs by many independents. Indeed, Disney and other off-network syndicators undoubtedly expect this result or they would not be fighting so hard for repeal.

The effect on independent stations of losing their most popular programming -- recent off-network series -- would be a severe blow. These programs anchor most independent stations' schedules during the early-fringe period, the most profitable

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[47] See pages 12-13 supra, pages 27-29 infra; Selzer and Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, ("OPP Paper"), 6 FCC Rcd 3996, 4000, 4025-28 (1991). Since affiliates also receive a large portion of their programming from their network and receive compensation for carrying that programming, they are able to devote more resources to the purchase of specific syndicated programs than independents.

part of their schedule.[48] The Commission itself has acknowledged that independent stations are dependent on popular, recent off-network programming for their "competitive viability"[49] and that loss of such programming would be a severe economic blow to them.[50] This is confirmed in a compelling way by LECG's econometric model.[51] The fragility of independent television stations is not an untested theory. At least nine independent stations have gone out of business since 1985,[52] and others have filed for bankruptcy. Without reasonable access to popular off-network programming, many independent stations would go dark, weakening the foundation of emerging networks like UPN and choking off their expansion.

C. Repeal Will Undermine the Ability of Local Stations to Build an Audience for the New Network's Prime Time Schedule.

PTAR will also play an important and more immediate role in helping its affiliates build an audience for the network's prime time schedule. PTAR helps independent stations attract their largest audiences of the day during the one hour period immediately preceding network prime time.[53] Attracting an

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48 See Fin-Syn Reconsideration Order at 8294 n.64.

49 See id. at 8295.

50 See id.; OPP Paper at 3999, 4000.

51 See pages 15-19 supra.

52 See Appendix F.

53 See Comments of the Association of Independent Television Stations, Inc. filed today in this proceeding.

audience tuned to a network affiliate's channel during the access hour is important to the network's prime time ratings not because it is difficult for viewers to switch to another channel, but because that audience provides the network with an exceptional opportunity to promote the network schedule. Viewers who are seated in their living rooms watching the affiliate's 7-8 p.m. programming are a much more fruitful and efficient target for advertising network prime time programs than, for example, those who might glance up at a billboard or listen to the radio during their evening commute home from work; the access hour audience is composed of people who are inclined to watch television and who have set aside some time that very evening to do so. Moreover, there is no good substitute for that audience for network promotions since no network advertises its prime time programs on stations affiliated with a competing network.[54]

Thus, although access hour viewers can easily switch to another channel at 8:00 p.m. when prime time begins or, indeed, at any time if they are not interested in the network offerings, a solid access hour audience provides the new networks with a matchless opportunity to convince viewers not to switch. And, in fact, all of the television networks take advantage of the

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[54] The effectiveness of on-air audience promotion of programming is confirmed by Paramount's experience. Paramount's Entertainment Tonight is the longest running strip in first-run syndication. Paramount's research shows that stations that increase their number of on-air spots promoting Entertainment Tonight get stronger ratings for the program almost immediately. Conversely, stations that let their on-air promotions slide experience a decline in the program's ratings. See Appendix G.

dynamics of "audience flow" throughout the evening in designing their program schedules and building their audiences.

The phenomenon of audience flow from the access period into the first hour of prime time is confirmed by the LECG Report. The data indicates that independent stations' ratings increased after PTAR went into effect not only for the second half-hour of the access period but also for the first hour of prime time.[55] LECG concluded, based on the data, that "there is a statistically significant carryover effect on ratings due to PTAR in the adjacent prime time periods."[56] Indeed, based on the historical data, LECG predicts that repeal of PTAR could result in an even steeper ratings decline for the first hour of prime time than for the access period itself.[57]

The Commission itself recently acknowledged the importance of audience flow from syndicated programming to the network schedule. In the fin-syn proceeding, it concluded that in deciding whether to syndicate a popular, off-network program to an independent station or its own affiliate, "a network would rationally factor into that economic equation the marginal potential ratings effect on its affiliated station's <u>network</u>

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55 <u>See</u> LECG Report at 48.

56 <u>Id</u>.

57 <u>See</u> page 17 <u>supra</u>.

programming of carrying -- or, alternatively, competing with another station carrying -- the syndicated program at issue."[58]

The ability of a network affiliate to promote the network's prime time schedule effectively is important to any network. Yet the special synergy between UPN's programming and the popular off-network programming typically aired by independent stations during the access hour makes the phenomenon of audience flow from the access hour into prime time particularly important to the success of this new network. UPN has targeted an audience demographic of 18-49 year olds.[59] That is the same demographic group most attracted to popular off-network programming during the access hour.[60] Thus, the loss of popular off-network programming by UPN's affiliates will result not simply in a general ratings decline, but in a ratings decline in precisely that demographic group that UPN hopes to attract as an audience for its prime time schedule. Thus, it is particularly important to the success of UPN's prime time schedule that its affiliates be able to retain the popular off-network series that they now air during the access period.

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[58] Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094, 3131 n.112, as modified, 7 FCC Rcd 345 (1991), reversed and remanded on other grounds, Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1992) (emphasis added). See also Fin-Syn Order at 3319-24.

[59] See Tobenkin, UPN and The Next-Generation Network, Broadcasting & Cable, January 2, 1995 at 34 (interview with Lucie Salhany, President and Chief Executive Officer of UPN).

[60] See Appendix H and I.

IV. THE LECG REPORT DEBUNKS THE MYTHS THAT HAVE BEEN CIRCULATED IN AN EFFORT TO DISCREDIT PTAR.

In an effort to discredit and justify the repeal of PTAR, a number of myths have been circulated in recent years concerning the competitive positions of the networks and UHF stations and practices in the syndication industry. Viacom refers to these as "myths" because they are not grounded in fact and yet have been repeated so often that they have begun to acquire a patina of credibility simply through repetition. The LECG Report has subjected these myths to empirical testing and analysis and revealed them to be fictional -- in some cases 180° from the truth.

A. <u>The Myth of the Disappearing UHF Handicap</u>.

One myth that has been widely circulated but never before tested empirically is the myth that the spread of cable during the 1980's has erased the "UHF handicap" that has historically afflicted most independent stations by eliminating the technological differences between UHF and VHF stations in those homes that subscribe to cable. The Commission has specifically requested comment on whether the UHF handicap still persists.[61]

The LECG Report demonstrates that stations that operate on UHF channels continue to suffer a substantial UHF handicap -- even in homes that subscribe to cable. In a test designed to control for extraneous effects on ratings, LECG compared the ratings of programs broadcast on Fox's VHF affiliates to the

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[61] <u>See</u> NPRM at 6351.

ratings of the same programs broadcast during the same time periods on Fox UHF affiliates. The data demonstrates that broadcast on a UHF channel decreases a program's ratings from 1 to 4 points, depending on the day and time period of the broadcast.[62] Since all program ratings in this analysis were for the same Fox programs broadcast by affiliates of the Fox network during the same time periods, the disparity in the ratings cannot be attributed to network affiliation or network promotion.

The fallaciousness of the myth that cable penetration has leveled the playing field between VHF and UHF stations is also demonstrated by data in the LECG Report showing that the economic gap between network affiliates and UHF independents widened substantially during the decade of rapid cable expansion in the 1980's.[63] If cable had erased the UHF handicap, one would expect that gap to have narrowed.

If there were any doubt remaining concerning the persistence of the UHF handicap, it should be put to rest by the immediate and pronounced impact that recent VHF/UHF affiliate switches have had on the ratings of the major networks. As discussed in Section II.B. above, the substitution of UHF stations for the VHF stations formerly affiliated with the major networks in a number of markets caused an immediate slide in network ratings.[64] It

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62 See LECG Report at 41-44.

63 See LECG Report at 31-41; page 12 supra.

64 See page 11 supra.

will be interesting to see whether the networks assert in their comments filed in this proceeding that the UHF handicap has been eliminated even while they experience its effects and fight for VHF affiliates in the marketplace.

Of course, in the 40% of the households in the country that do not subscribe to cable, the UHF technological handicap has not diminished at all. Clearly, in fulfilling its public interest responsibilities, the Commission cannot ignore 40% of the households in the United States simply because they have chosen not to subscribe to cable, cannot afford to do so, or do not have the option of doing so. As the Supreme Court recently observed:

> [T]he importance of local broadcasting outlets "can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene. Although cable and other technologies have ushered in alternatives to broadcast television, nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming.[65]

B. The Myth of Eroding Network Dominance.

None of the myths has been accepted more unquestioningly than the myth that the three major networks' prime time dominance has declined as a result of the rise of cable and other video competitors. The networks cite the decline in their prime time market share from the stratospheric highs of the 1960s and 1970s

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[65] Turner Broadcasting System, Inc. v. FCC, ____ U.S. ____, 114 S. Ct. 2445 (1994) (citations omitted).

-- when they collectively captured well over 90% of the prime time viewing audience -- as the starting and ending point of their analysis.

If the decline in network ratings during the 1980s indicated that network market power in prime time had actually decreased substantially, however, that reduction in network market power should also be reflected in declining national advertising rates, which are an objective measure of the extent to which the networks still dominate prime time. National advertisers are an extremely savvy group of purchasers, and if there were good alternative ways of getting access to the national prime time television audience, one would expect them to utilize those alternatives, thereby putting competitive pressure on network prime time advertising rates. Yet those rates have not declined.

In fact, the LECG Report shows that network prime time advertising rates rose substantially during the 1980s even while network market share declined.[66] Indeed, those rates rose substantially faster than the rate of inflation and much faster than the increase in basic cable channel rates.[67] This is the

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[66] See LECG Report at 21-25. The LECG Report does show that network prime time advertising rates have declined somewhat since 1990, but LECG concludes that those declines, which are not coincident with the decline in network ratings during the 1980s, are attributable in part to the recession and in part to competition from the emerging Fox Network and from successful first-run syndicators like Viacom and King World who sell time to national advertisers. See LECG Report at 27-30; pages 46-47 infra.

[67] See LECG Report at 21-25. It seems fundamentally inconsistent to view network prime time dominance as having eroded to the point that it no longer causes market imbalances,

best objective evidence available that while other video program providers have chipped away at network prime time ratings, the major broadcast networks still retain an extraordinary amount of market power in prime time television.[68]

C. The Disney Myths.

The Walt Disney Company ("Disney"), a noted developer of animated fairy tales, has created two myths that have achieved wide currency in the debate over the fate of PTAR. We will refer to these as the "myth of the significance of syndication clearances in markets 51-100" and the "myth of the collapsing back-end."

1. The Myth of the Significance of Syndication Clearances in Markets 51-100.

Disney has argued that network affiliates' preference in markets 51-100 for airing first-run programming during the access hour indicates that top-50 market affiliates would prefer first-run programming during that period even if PTAR's off-network restriction were repealed.[69] That argument is specious and

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while at the same time viewing cable rate increases -- which have recently been regulated by the Commission pursuant to Congressional mandate -- as the product of excessive market power requiring governmental regulation.

[68] ABC, CBS and NBC appear generally to be in good financial health. The Broadcast Cable Financial Management Association reported that their revenue grew by 6% during 1994, surpassing the $9 Billion mark. See Broadcast & Cable, March 6, 1995, at 53. Moreover, their willingness and ability to double the compensation paid to their affiliates in 1994 attests to their financial strength. See page 39 infra.

[69] See Walt Disney Studios, PTAR Top-50 Market Access, Position Paper, April 1994, at 7-12.

totally ignores the competitive forces that would affect the television program marketplace if PTAR's off-network restriction were repealed.

As explained at length in LECG's analysis, the fact that PTAR essentially restricts affiliates in the top-50 markets to showing first-run programs during the access hour makes the purchase of the same programs by affiliates in smaller markets less risky; the programs are not offered in the smaller markets unless they are pre-sold in enough larger markets to warrant expenditure of the necessary production and promotion costs.[70] In addition, in the smaller markets where first-run shows must compete with off-network shows for broadcast during the access hour, syndicators can lower first-run syndication fees to levels that are affordable by stations in smaller markets and that are competitively priced with off-network product because they can recover a substantial portion of their up-front and per episode costs in the top-50 markets, which cover 66.7% of viewer households.

Thus, program purchases in the smaller markets while PTAR is in effect in the larger markets are not indicative of what would happen to first-run programming in either small or large markets if the off-network provision of PTAR were repealed. Instead,

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[70] See LECG Report at 59-63. This "sequencing" of first-run syndication sales is reflected in the data. The data demonstrates that a large majority of the stations that purchase first-run syndicated programming soon after the program is first offered for sale are stations in the fifty largest markets. See id. at 61-63.

what is likely to happen is that off-network programs will replace first-run programs on many affiliates during the access hour in the top-50 markets. The resulting reduction in time available for first-run programs during the access hour on strong network affiliates in the top-50 markets will lead to a substantial curtailment of production of first-run programs, affecting both top-50 and below-50 markets.

2. <u>The Myth of the Collapsing Back-End</u>.

Disney has argued vociferously that the chief adverse effect of PTAR is that it reduces the profitability of off-network distribution and thus the ability of producers to finance the production of high-quality programs for network television. In its April 1994 Position Paper,[71] Disney asserted that "[r]evenues from off-network programming have declined sharply in recent years -- from an average of $1.3 million per episode in 1989 to $675,000 in 1994." Further, Disney claimed that off-network programs would bring on average $500,000 per episode in 1995, "[e]xcluding Home Improvement and Seinfeld which are financial aberrations in off-net . . ."[72] It concluded:

> The collapse of the back-end exacerbates the economic "squeeze" on both network producers and off-net distributors. Without regulatory relief, the future of high-quality broadcast programming is in jeopardy.[73]

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71 <u>See</u> Walt Disney Studios, PTAR Top 50 Market Access, Paper, April 1994, at 13.

72 <u>Id</u>.

73 <u>Id</u>.

Disney's "collapsing back-end" is a myth -- the product of the selective and misleading use of data. A list of off-network programs released in syndication each year from 1989 through 1995 showing the revenues per episode at which they were sold is attached as Appendix J. The exhibit demonstrates that the prices of off-network programs have varied during this period, reflecting the relative popularity of the off-network programs being released into syndication from year to year. In those years where highly rated network shows were released in syndication -- Who's the Boss, Golden Girls, Married with Children, Roseanne, Simpsons, Home Improvement, Seinfeld -- those programs brought high prices in syndication. Indeed, far from a collapsing back-end, off-network syndication prices reached a high-water mark in 1995, with Home Improvement syndicated for more than $3,500,000 per episode[74] and Seinfeld syndicated at an estimated $2,000,000 per episode. The only apparent reason Disney excluded these shows as "financial aberrations" is because they destroy its myth of the collapsing back-end -- particularly since "Home Improvement" is a Disney production that will generate huge syndication profits for it and belies its complaint of a "financial squeeze." When the data didn't fit its thesis,

[74] Broadcasting & Cable, January 23, 1995, at 76. Disney claims that "Home Improvement" is the second-highest grossing syndicated program _ever_. _Id_.

it rejected the data. Viacom respectfully suggests that the Commission reject the thesis instead.[75]

V. THIS IS THE WORST POSSIBLE TIME FOR THE COMMISSION TO REPEAL PTAR.

It is difficult to conceive of a less propitious moment than the present one for the Commission to reveal PTAR. The television industry is at a crossroads. The lifting of the network antitrust consent decrees, the recent repeal of the financial interest restrictions and the imminent expiration of the syndication restrictions auger momentous changes in the dynamics of syndicated program distribution in this country. For the first time in over twenty years, ABC, CBS and NBC will be able to own and control the distribution of syndicated programming, which will put them in a position to jeopardize independent stations' access to the popular off-network and first-run syndicated programs upon which they depend to attract their audiences.

Independent stations will be at a great disadvantage vis-a-vis network owned and affiliated stations in acquiring syndicated programming in the post-fin-syn world. As discussed below, the networks will be major producers and syndicators of television

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[75] Disney's argument is also belied by the fact that there are 12% more prime time network situation comedies on the air during the 1994-1995 season than there were during the 1990-1991 season (when Disney first started complaining about the "collapsing back-end"). <u>See</u> Appendix K. If Disney were correct that a collapsing back-end market would reduce the ability of producers to finance production of high quality programs for network television, one would expect the number of situation comedies, which constitute the bulk of off-network access programming, to decline as the back-end declines.

programming, and will have strong incentives to steer the most desirable programming to their owned and affiliated stations. Thus, it is more important than ever that PTAR be retained in order to assist independent stations in acquiring popular newly released off-network programming for the access period -- at least until the fifth and perhaps sixth networks are well established and provide substantial prime time offerings to their new affiliates.

A. Network Dominance is On the Rise as the Networks Deepen Their Hold on Their Affiliates.

Repeal of PTAR at the present time would be particularly imprudent because it would come just as the networks are (1) deepening their hold on their affiliates by lengthening the terms of network-affiliate contracts and (2) aligning network and affiliate economic interests by making equity investments in their affiliates. The recent attempts by the networks to strengthen their relationships with their affiliates are defensive tactics that are being employed to lock in their affiliates. The heated competition among the networks for VHF affiliates was set in motion last May when Fox bought a 20% equity interest in New World Communications Group for $500 Million and entered into a ten-year affiliation agreement with New World covering its 12 stations.[76] Fox's aggressive foray

[76] See, e.g., Foisie, Fox and the New World Order, Broadcasting & Cable, May 30, 1994, at 6; Stern, Small Investments Yield Big Benefits -- Networks Use Minority Interest in Stations to Lock in Affiliations, Broadcasting & Cable, Oct. 17, 1994, at 26.

did not stop with New World. Fox has also purchased equity interests in SF Broadcasting and Blackstar Acquisition. SF Broadcasting plans to acquire four major market affiliates that will switch their affiliation to Fox. Blackstar plans to buy eleven VHF network affiliates and change their affiliation to Fox.[77] Fox's affiliate raid touched off a series of affiliation changes involving at least 70 stations in more than 24 cities -- most of them major markets -- and the dust has not settled yet.[78]

ABC and CBS have also begun acquiring equity interests in station groups as a means of securing affiliates and possibly increased network programming clearances for the long term. ABC recently acquired an equity interest in Young Broadcasting and Young's five ABC affiliates promptly renewed their affiliations for ten-year terms -- until recently a term that was unusually long.[79] CBS formed a venture with Group W in July 1994 to acquire stations and lock them in as CBS affiliates. In addition, Group W's existing stations were secured as CBS affiliates for ten years.[80] The networks' attempts to lock in

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[77] See, e.g., Stern, supra at 28; Communications Daily, October 11, 1994, at 2.

[78] Farhi, The TV Violence That Isn't on the Tube -- CBS, NBC and ABC in Bitter Sparring Match with Fox over Affiliates, Washington Post, Nov. 23, 1994, at C1.

[79] Stern, supra at 28; Flint, ABC Has Young Affiliates, Variety, October 9, 1994, at 168.

[80] See Stern, supra at 28; Zier, CBS, Group W Form Historic Alliance, Broadcasting & Cable, July 18, 1994, at 14.

affiliates has not stopped with those stations in which they have bought equity stakes. There has also been a clear trend during the past year toward networks signing long-term affiliation agreements with stations and station groups in which they have no ownership interest.[81]

These long-term affiliation agreements and network acquisitions of equity interests in their affiliates will bind affiliates more closely to their networks, give the networks more control over their affiliates, and give the networks an even greater economic interest in the performance of their affiliates than they had before. The networks previously were interested in (1) the ratings of network programming broadcast by their affiliates and (2) the success of their affiliates' access hour programming to the extent that it affected network prime time ratings. A network that has an equity interest in its affiliate will now have a direct interest in the success of all of its affiliates' programming, including syndicated programming. Thus, these arrangements will give the networks additional incentives

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[81] See, e.g., Communications Daily, November 22, 1994, at 2 (reporting that Providence Journal and NBC signed 7-10 year affiliation agreements for Boise, Charlotte, Portland and Seattle stations); Zier & Ellis, Buying New Vision TV's for $230 Million, Broadcasting & Cable, November 21, 1994, at 6 (New Vision signs 10-year affiliation agreements with NBC and CBS); West & McClellan, Running With the Wind, Broadcasting & Cable, October 31, 1994, at 30 (all of ABC's recent affiliation agreements are for 10-year terms); McClellan, Keeping Up with the Affiliates, Broadcasting & Cable, August 1, 1994, at 11 (NBC announces 7 long-term affiliation agreements); Foisie, ABC Preempts CBS in Cleveland, Detroit, Broadcasting & Cable, June 20, 1994, at 7 (Scripps Howard signs 10-year affiliation agreements with ABC in 5 markets).

and opportunities to engage in the types of affiliate favoritism that the Commission identified as a clear danger resulting from repeal of the financial interest and syndication restrictions.

Moreover, the seminal network concern that has given rise to these new business arrangements -- concern over affiliate defections to competing networks -- will itself give the networks powerful incentives to buy affiliate loyalty with preferential treatment in the distribution of syndicated programming. Indeed, the networks have already tried to buy affiliate loyalty by substantially increasing affiliate compensation; to keep their affiliates from switching to a different network, ABC, CBS and NBC paid an estimated $250 Million in affiliate compensation in 1994 -- approximately double what they paid the previous year.[82] It does not require a lot of imagination to see that the networks might be willing to provide other favors to their affiliates to strengthen their schedules and keep them happy. As the Commission observed in the fin-syn proceeding, such conduct could weaken both independent syndicators and independent stations.[83]

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[82] Farhi, The TV Violence that Isn't on the Tube -- CBS, NBC and ABC in Bitter Sparring Match with Fox over Affiliates, Washington Post, November 23, 1994 at C4; McClellan, NBC Still Considering Offers, Wright Says, Broadcasting & Cable, October 24, 1994, at 20; West & McClellan, Running With the Wind, Broadcasting & Cable, October 31, 1994, at 30, 31. The press has reported that the networks expect high clearances of network programs in exchange for the large compensation fees that they are paying to their affiliates. Tobenkin, Nets Want Clearance Bang for Buck, Broadcasting & Cable, November 7, 1994, at 20.

[83] See Fin-Syn Order at 3318-21, 3327-30.

B. **The Networks are Beginning to Increase Substantially Their Level of In-House Production Activity.**

Of course, the primary reason that these developments pose such a threat to independent stations is that recent developments indicate that the networks have every intention of taking advantage of their new freedom to produce, own and -- once the syndication rule is repealed -- syndicate programming. The networks dramatically increased their levels of in-house production of television programming for their prime time schedules following the elimination of the limits on in-house production contained in the network consent decrees and the Commission's elimination in 1993 of the 40% cap on in-house productions.[84] As Broadcasting & Cable Magazine trumpeted last year:

> The post fin-syn era has arrived. For the first time in history, the big three network in-house production divisions are the major suppliers to their respective network schedules.[85]

ABC Productions is supplying the ABC network with five series representing four hours of programming, including four of the network's new series, as well as supplying a half-hour comedy for CBS; CBS Entertainment Productions is producing five series

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[84] See Ginsberg, Independent TV Firms Shudder as Networks Hike In-House Production, Los Angeles Bus. J., July 19, 1993, at 40; Tyrer, Producers Scorecard: Winning Isn't Everything, Electronic Media, June 7, 1993 (noting that a tight economy and changing regulatory environment had pushed the networks to become their own leading suppliers of programming and describing the effects of this development on independent producers).

[85] Coe, Networks Are Their Own Best Customers, Broadcasting & Cable, May 30, 1994, at 21.

representing four and a half hours of programming; and NBC Productions is supplying the NBC network with four series, two of which are new. Id. Moreover, the expiration later this year of the provision in the network consent decrees limiting the duration of network-producer contracts to four years will further enlarge network control over the programs aired on the networks' schedules.

In addition to an increased level of in-house production activity, media analysts have widely predicted joint ventures and mergers between the networks and movie studios when the remaining syndication restrictions expire this year.[86] Indeed, those predictions have already been partially realized with the announcement of a joint venture between ABC and a new movie studio formed by Steven Spielberg, Jeffrey Katzenberg and David Geffen, which represents ABC's single biggest production venture to date.[87] According to one media analyst, the deal "reflects what [ABC has] been saying they would do for the past several years, which is produce more of their programming in-house."[88] Although CBS and NBC have not yet moved quite as aggressively as ABC into in-house production and joint ventures with studios,

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[86] See, e.g., Carter, The Media Business -- Converging Interests, N.Y. Times, September 2, 1994, at A1.

[87] See Landro, Trachtenberg, Turner & Goldman, A Deal Between ABC and a Hollywood Trio Could Reshape TV, Wall St. J., Nov. 29, 1994, at A1; McClellan, ABC Makes High-Profile Production Leap, Broadcasting & Cable, Dec. 5, 1994, at 18.

[88] McClellan, supra at 18, quoting Smith Barney analyst John Reidy.

they too are producing a substantial portion of their network schedules in-house[89] and have entered into or are exploring joint ventures to produce programming.[90]

The demise of the syndication rule this year is likely to usher in even more intense efforts by the networks to control their programming, either through in-house production or joint ventures or mergers with Hollywood studios that have heretofore been prohibited because the studios are actively engaged in syndication. For their part, those Hollywood studios that have traditionally been the source of most network programming and are not already involved in efforts to establish their own networks will have strong incentives to enter into joint ventures or even merge with the networks so that they are assured of a distribution system for their product in the future.[91]

The substantial upswing in network production activities coupled with the strengthening of network/affiliate relationships poses clear risks to independent stations. The Commission acknowledged in the fin-syn proceeding that repeal of the syndication rule carried a risk of compromising independent

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[89] See page 40 supra.

[90] CBS's joint venture with Group W will acquire stations that are to be affiliated with the CBS network and will also produce programming for the joint venturers' stations. Zier, CBS, Group W Form Historic Alliance, Broadcasting & Cable, July 18, 1994, at 14. Upon expiration of the syndication rule, the joint venture will start syndicating its programs. Id. NBC is also trying to strike deals with Hollywood studios. See Wall St. J., Nov. 29, 1994, supra at A1.

[91] See, e.g., Carter, The Media Business -- Converging Interests, N.Y. Times, September 2, 1994, at A1.

stations' access to off-network programming, both by delaying the commencement of syndication of a few, popular network programs,[92] and by favoring their affiliates in the distribution of the most attractive syndicated programs.[93] It was for those reasons that the Commission was not willing to "risk the denial of independent stations' access to such programming until [it has] had the opportunity to review how the networks behave in response to their renewed freedom to acquire financial interests in programs."[94] Thus, it retained syndication restrictions, adopted a prohibition on warehousing, and imposed reporting requirements that will enable it to monitor network practices for an interim period. It also resolved to initiate another proceeding 18 months after the consent decrees are lifted to review network practices before taking the step of eliminating the remaining restrictions.[95]

In light of the Commission's well-grounded concerns, it would be imprudent and capricious for it to rush ahead and repeal PTAR (or the off-network aspect of PTAR) before it even has a chance to observe if the profound changes in the dynamics of the syndication marketplace that will result from repeal of the fin-syn rules do in fact jeopardize independent stations' access to

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[92] See Fin-Syn Order at 3322; Fin-Syn Reconsideration Order at 8294-95.

[93] See Fin-Syn Order at 3324; Fin-Syn Reconsideration Order at 8294-95.

[94] Fin-Syn Order at 3322-23.

[95] Fin-Syn Order at 3340-42.